No. 14692.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NATIONAL WHOLESALERS, a corporation; M-D PARTS MANUFACTURING COMPANY; NATIONAL PARTS COMPANY, and HENRY MEZORI,

Appellees.

APPELLEES' BRIEF.

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Preliminary Statement.

This case was tried without a jury before the United States District Court for the Southern District of California, Central Division. On December 1, 1954, the District Court filed its opinion and order for findings of fact, conclusions of law and judgment dismissing the Government's complaint. [R. 42-46.] The opinion of the District Court is reported. (126 Fed. Supp. 357.) Findings of fact, conclusions of law and judgment were signed and filed by the District Court December 16, 1954. [R. 46-54.] The District Court by reference made its opinion a part of its findings of fact. [Find., Par. XI, R. 52.]

The appellant's statement of the case (Appellant's Br. pp. 1-9) is contested by appelleees. Appellant has not, as

required by the rules of this Court, *Paragraph 2(c) of Rule 18,* presented in its statement of the case the questions involved on this appeal or the manner in which they were raised. Because of that omission and the substantial inaccuracies in the facts related, appellees will, pursuant to *Paragraph 3 of Rule 18,* make a statement of the case; but before doing so appellees feel that they should invite this Court's attention to the scurrilous, scandalous and impertinent character of appellant's brief.

Appellant's Brief Should Be Stricken.

Appellant's brief contains numerous statements, wholly aside from the facts shown by the record, bearing reproachfully upon the moral character of the appellees and reflecting upon the judicial integrity of the lower court, which are clearly impertinent and scandalous, and unfit to be submitted to this Court. The appellant's brief should be stricken.

Green v. Elbert, 137 U. S. 615, 11 S. Ct. 188 (1891);

Davidge v. Simmons, 266 Fed. 1018 (1920), cert. den. 257 U. S. 667, 42 S. Ct. 184.

There is nothing in the record to support the baseless charges made at pages 11 and 12 of appellant's brief that the "undisputed facts in the record" show a deliberate course of conduct on the part of the appellees calculated to defraud the United States in the procurement of war material. In the course of Counsel's tirade appellees are called "defrauders" and "counterfeiters," names which should be used sparingly, even if there were some support in the record for such name calling; here there is none. No reference is made to the record and none can be made in support of the untrue statements of Counsel that the

"undisputed facts in the record" establish that the appellees are "defrauders" and "counterfeiters."

A far more serious charge than Counsels' indictment of the appellees is their unwarranted attack upon the District Court, impugning its honesty of purpose, impartiality and fairness in the rulings made during the trial. Counsel say, at pages 11 and 12 of appellant's brief:

> "Notwithstanding appellees' complete and shocking disregard of basic and ordinary standards of honesty, the court below has ruled that their scheme to pass off their regulators as Delco-Remys does not come within the purview of the False Claims Act."

There can be no excuse for Counsel's attack on the District Court. The attack appears to have been deliberately made from the halls of the Department of Justice at Washington; among those signing the brief is Warren E. Burger, Assistant Attorney General. It is probable that none other than a Government attorney would have made such an attack upon the lower court. The brief may be stricken by this Court on its own motion, if the Court be so advised.

> *Anderson v. Federal Cartridge Corp.* (C. A. 8), 156 F. 2d 681 (1946), and the cases cited in support of the rule at page 686 of the Opinion.

The motive for the impertinent, scurrilous and scandalous brief of appellant may be found in Counsel taking the side of big business in its attempt to allocate to itself all contracts with the Armed Services for supplies and materials in frustration of the declared policy of The Congress "that a fair proportion of the total purchases of, and contracts and services for, the Government shall be placed with small business concerns." (41 U. S. C., Sec. 151(b).) The appellees singly and collectively con-

stitute a small business. It is known to everyone that General Motors, of which Delco-Remy is a division, is by far the largest contractor with the Armed Services for the supply of war materials. Counsel describe contract No. DA-20-018-ORD-3951 as being "in the vital area of the procurement of war materiel" for the United States. (Appellant's Br. p. 11.)

Counsel apparently take the side of big business in the contest between little business with big business for a fair share of defense contracts. No other construction may be given to the following statement on page 17 of appellant's brief:

> "But appellees could not have failed to recognize that, despite all such precautions, their unauthorized and improper use of the Delco-Remy name might come to light, leaving them open to the risk of having to pay heavy damages to General Motors for unfair competition and perhaps for trade-mark infringement as well."

Counsel's gratuitous solicitude for the general welfare of General Motors reveals that the objective of the Department of Justice in the prosecution of this suit may be to put small business competitors of General Motors out of the running for defense contracts. Appellees believe that General Motors, with the advice of its batteries of competent counsel, is now and has been able to determine, without the aid of the Department of Justice, whether or not it has been the victim of unfair competition or trademark infringement. The statutes of limitation have now run on all such suits as those proposed by Counsel on behalf of General Motors.

There is nothing in the record to support the threat of a suit by General Motors. The other 20 bids on the regu-

lators were high, so the contract was awarded to appellee, National Wholesalers, the lowest bidder. [S. R. 285.] The item description of the regulator in the contract [S. R. 295] was found by the District Court to "serve, instead of a lengthy recital of specifications, as a brief shorthand alternative description of the actual physical regulator contracted for" (126 Fed. Supp. 357, (2), (7), (8)) to "indicate the type or model, design and composition of the regulator contracted for." [Find. XI, R. 52.] The Court also found [Find. IX, R. 51] "that the regulators delivered to the Government by the defendants were for exclusive Army use. The regulator is not and never has been a patented article. It has never been sold to the public by Delco-Remy or anyone else." It was stipulated in the pre-trial stipulation [R. 33] that the regulators delivered to the Government by appellees "did not have the trademark or serial number of Delco-Remy imprinted on them." Counsel have in no way attacked those findings of fact. Counsel's attempt to make General Motors an invisible party to this action shows a further lack of merit in the appeal and may move this Court to order the brief stricken because of the intimidation aspects of a suggested suit by General Motors against appellees.

Appellees' Statement of the Case.

The complaint, filed July 3, 1953 [R. 3-10], sought the recovery from the defendants of penalties for alleged false claims against the Government under 31 U. S. C., Sections 231, 232, 233. (126 Fed. Supp. 357.) There is no specific allegation in the complaint that the Government suffered any damage. The complaint is based solely on the theory that the Government was entitled to recover a $2,000.00 penalty for each of the certificates made by the

contractor on the invoices [Pltf. Ex. 1, R. 103] for the payment to the contractor of the purchase price of $23.50 each for the 6600 voltage regulators,[1] or $155,100.00 in all, as the regulators were delivered to Army Ordnance at the times required by contract No. DA-20-018-ORD-3951, dated April 1, 1950. [S. R. 285-295.] The complaint alleged that the contract required the defendants to deliver to the Government genuine Delco-Remy regulators and that the defendants conspired to deliver, and did deliver, 6600 inferior regulators of their own manufacture and assembly instead of the genuine Delco-Remy regulator which it is alleged the contract required to be delivered.

In their answer [R. 12-17] the defendants denied the fraud and conspiracy alleged in the complaint. The defendants alleged by way of separate defense [R. 13-17] that the 6600 regulators delivered to the Government were the exact regulators contracted to be delivered and that they complied in all respects with the specifications of contract No. DA-20-018-ORD-3951. The answer alleged a dispute between Army Ordnance and the defendants, which dispute arose after 4086 of the regulators had been delivered, as to whether or not the regulators already delivered were the regulators called for by the contract. The answer alleged that Army Ordnance resolved the dispute by testing the regulator already delivered from which test it was found by Ordnance that the regulator complied in every respect with the specifications of the contract.

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[1]A voltage regulator is a governor controlling the amount or rate of flow of the electric current from the generator to the storage battery. The radio, lights, and other electrically operated units of a motor vehicle run off the battery. The regulator controls the flow of the current from the generator to the battery so that the battery charge will not fall too low or rise too high.

Based on the test [Deft. Ex. B, R. 124-125], the duly authorized contracting officer for Army Ordnance made a written decision [Deft. Ex. A, R. 115-118] that the regulators already delivered qualified under the contract as "or equals" and directed the defendants to deliver the balance remaining of 2514 regulators, which was done.

Each of the 6600 regulators were inspected and accepted by Ordnance and certified by the resident inspector for Ordnance as "conforming to contract requirements" [R. 34]; and the full purchase price for the 6600 regulators of $155,100.00 was paid by the Government to appellee, National Wholesalers. Not one of the 6600 regulators was rejected by Ordnance. [R. 249-250.] The decision of the contracting officer was made under Chapter 3 of the *Public Contracts Law, Procurement of Supplies and Services by the Armed Services,* 41 U. S. C., Sections 151-161, and pursuant to paragraph 14 of the contract. [S. R. 287.] The Government concedes the authority of the contracting officer to make the decision. (Appellant's Br. p. 21.)

Pursuant to the pre-trial order of the lower court extensive pre-trial proceedings were had. [R. 17-42 and 56-97.] The pre-trial stipulation [R. 30-37] disposed of all of the issues raised by the complaint and answer, except the questions of conspiracy, fraud and damages. [R. 36.] In response to those issues the District Court found [R. 50-52] that the defendants did not conspire to make or present, nor did they or any of them make or present any false claims, certificates, invoices, vouchers or accounts as alleged in the complaint, or otherwise; and that the Government had not been damaged. From the facts so found, the Court concluded [R. 52-53] as a matter of law that there being no fraud, the plaintiff's complaint should be dismissed.

ARGUMENT.

I.

The Finding of No Fraud Ends the Government's Case.

The crux of an action brought under Section 231, 31 U. S. C., is whether or not the claims presented were false. The District Court found [Find. VII, VIII and IX, R. 50-51] that the claims presented were not false, fraudulent, or fictitious. It really would not matter if there was no other finding in the case except that the claims presented were not false. The case stops at that point.

The statute, Section 231, 31 U. S. C., only applies where a person presents a claim to the Government, knowing such claim to be false, fictitious or fraudulent. The rule is that the statute makes "fraud of some sort the basis of the liability, and uses the word in its accepted sense of deceit, as appears from the juxtaposition of the three adjectives "false," "fictitious" and "fraudulent."

> *United States ex rel. Brensilber, et al. v. Bausch & Lomb Optical Co., et al.* (C. A. 2), 131 F. 2d 545, 546 (1942), aff'd, 320 U. S. 711, 64 S. Ct. 187 (1943), reh. den., 320 U. S. 814, 64 S. Ct. 256 (1943).

To prevail in an action under Section 231, the United States must prove fraud of some sort. "Fraud implies a misrepresentation of a material fact, either express or implied."

> *United States v. Bressler* (C. A. 2), 160 F. 2d 403, 405 (1947).

The record here is bare of any misrepresentation made by appellees. The complaint does not allege that any mis-

representations were made by appellees; nor does the record reveal that the Government offered any evidence that the appellees, or any one of them, made any misrepresentations.

An ordinary complaint in the Federal Courts can now be quite simple. A detailed statement of the case in a complaint is no longer necessary except where the cause of action is based on fraud or mistake; the facts constituting fraud or mistake must be alleged with particularity.

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."
>
> *Fed. Rules Civ. Proc.,* Rule 9(b).

Fraud must be specifically alleged and proved; it is never presumed.

> *United States v. Wunderlich,* 342 U. S. 98, 100, 72 S. Ct. 154, 155 (1951);
>
> *United States v. Colorado Anthracite Co.,* 225 U. S. 219, 226, 32 S. Ct. 617, 620 (1912).

The certificates on the invoices are alleged in the complaint to be false and fictitious because it is claimed that the defendants did not deliver to the Government genuine Delco-Remy voltage regulators known as Delco-Remy parts No. DR-1118502, but substituted other and inferior voltage regulators and parts of their own assembly and manufacture. [Comp., Pars. XIII-XIV, R. 8-9.] The purported allegation of fraud in the complaint is insufficient. "Inferior" is a mere conclusion of law. The allegation of fraud does not meet the requirement of *Rule 9(b) of Federal Rules of Civil Procedure,* nor the cases

here cited. The complaint wholly fails to state a cause of action under Section 231, of 31 U. S. C.

More important than any question of pleading is that after about 60% of the 6600 regulators had been delivered, Army Ordnance found [Deft. Ex. B, R. 123-125], and so notified appellees, that the regulators already delivered by appellees to the Government were not only not inferior to the genuine Delco-Remy regulator, but were exactly the same as to quality, appearance, performance, tolerance, construction, and materials used, and that the characteristics of the two regulators were similar and that they were interchangeable. [Find. IV, R. 48-49.]

One of the leading cases on the subject of how to plead and prove fraud so as to make a case under Section 231, 31 U. S. C., is *United States v. U. S. Cartridge Co.* (E. D. Mo.), 95 Fed. Supp. 384 (1950), aff'd (C. A. 8), 198 F. 2d 456 (1952), cert. den., 345 U. S. 910, 73 S. Ct. 645 (1953).

In that case the District Court held, in a 43-page opinion, that the only fraud which will sustain an action under Section 231, 31 U. S. C., is fraud in connection with the making of a claim against the Government. At pages 394, 395, and 396 of the opinion in 95 Fed. Supp., what is necessary to state a case of fraud under Section 231, 31 U. S. C., and to prove fraud is learnedly discussed in great detail.

In the present case the Government alleged that the regulators delivered were inferior simply because they were not of Delco-Remy manufacture. The making of inferior war material, which fails to measure up to the standard provided in the contract, does not authorize

an action for recovery of the penalties or damages provided in Section 231, 31 U. S. C.

Hillgrove v. Wright Aeronautical Corp. (C. A. 6), 146 F. 2d 621, 622 (1945);

United States v. U. S. Cartridge Co., supra.

No amount of piling up in the appellant's brief of adjectives such as "false," "fictitious," "fraudulent," "shocking," "counterfeit," and "inferior" will suffice to meet the requirements of pleading and proof necessary to make a case of fraud under Section 231, or any other case of fraud.

The Supreme Court had occasion to discuss in *United States v. Wunderlich,* 342 U. S. 98, 72 S. Ct. 154 (1951), the necessity for specifically alleging and proving fraud in an action involving the finality of a contracting officer's decision made under a dispute clause in the exact language of paragraph 14 of the contract here. [S. R. 287.] The Supreme Court said on the subject, at page 100 of the opinion:

> "In *Ripley v. United States,* 223 U. S. 695, 704, 750, 32 S. Ct. 352, 356, 56 L. Ed. 614, gross mistake implying bad faith is equated to 'fraud.' Despite the fact that other words such as 'negligence,' 'incompetence,' 'capriciousness,' and 'arbitrary' have been used in the course of the opinion, *this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved.* So fraud is in essence the exception. By fraud we mean conscious wrong-doing, an intention to cheat or be dishonest. *The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.*

> "If the decision of the department head under Article 15 is to *be said aside for fraud, fraud should be alleged and proved, as it is never presumed, United States v. Colorado Anthracite Co.,* 225 U. S. 219, 226, 32 S. Ct. 617, 620, 56 L. Ed. 1063. In the case at bar, there was no allegation of fraud. There was no finding of fraud nor request for such a finding. *The finding of the Court of Claims was that the decision of the department head was 'arbitrary,' 'capricious,' and 'grossly erroneous.' But these words are not the equivalent of fraud, the exception which this Court has heretofore laid down and to which it now adheres without qualification."* (Emphasis ours.)

The nature, character and purpose of an action brought under Section 231, 31 U. S. C., is well illustrated in *United States ex rel. Marcus v. Hess, et al.,* 317 U. S. 537, 63 S. Ct. 379 (Jan. 18, 1943), a case strongly relied upon by the Government here and in the lower court. In that case the defendants had been, prior to the filing of the civil complaint, indicted under the criminal provisions of the False Claims Act. They had pled *nolo contendere* and were fined $54,000. Action was then brought by an informer to recover the penalties and damages provided in Section 231, 31 U. S. C. The defendants interposed the defense of double jeopardy and that the informer had procured his information for the civil action from the criminal files in which the defendants had pled *nolo contendere* and been fined.

The Supreme Court rejected both defenses and stated, at pages 551-552 of the opinion, that the chief purpose of the civil action was to recover the money which the Government had lost by reason of the fraud of the

defendants. The Supreme Court said, at pages 551-552 of the opinion:

> "We think the chief purpose of the statutes here was to *provide for restitution to the government of money taken from it by fraud,* and that the device of double damages plus a specific sum was chosen to make sure that *the government would be made completely whole.*" (Emphasis ours.)

The facts in the *Hess* case showed that the bidders had all agreed that defendant Hess, one of their number, should get the contract. Hess was to put in a bid in an amount agreed to by all, which the others were to top so that their bids would inevitably be rejected. Rigging the bidding in the manner in which it was done was a gross fraud upon the United States which caused the Government to suffer a large amount of damages. Mr. Justice Black held that the Government was entitled to restitution of the money so taken from it by fraud.

The *Hess* case is strongly in favor of the appellees because here no money has been taken from the Government by fraud. The Government got the exact regulator it contracted to buy. It paid the purchase price after inspection and acceptance of the regulators. Not one of the 6600 regulators was rejected, nor was any one of them returned as being inferior or not in compliance with the contract. [Find. IV, R. 48-49.]

A presumption of correctness attaches to the findings of the District Court that the claims presented to the Government for payment were neither false, fraudulent nor fictitious, and that the regulator delivered complied in all respects with the contract.

> *Paramount Pest Control Service v. Brewer* (C. A. 9), 177 F. 2d 564, 567 (1949).

There is not one word of testimony in the record tending to show that the certificates on the invoices were false, fraudulent or fictitious, or that the appellees or any one of them made any false representations of any kind. It was incumbent upon the Government to produce evidence that the certificates were fraudulent. Its failure to do so brought this case to an end in the District Court by the dismissal of the Government's complaint. This Court has held over and over again that it will not disturb findings of fact made by the lower court based, as these are here, on substantial evidence, even though there may be some conflict in the testimony. One of the most recent of these cases is *Carr v. Yokohama Specie Bank, Ltd.* (C. A. 9), 200 F. 2d 251, 254-255 (1952), where the Court said:

> "And the federal rule relating to findings of a trial court does not require the court to make findings on all facts presented or to make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the court they are sufficient. Norwich Union Indemnity Co. v. Haas, 7 Cir., 179 F. 2d 827, 832. Nor is it necessary that the trial court make findings asserting the negative of each issue of fact raised. It is sufficient if the special affirmative facts found by the court, construed as a whole, negative each rejected contention. The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence. Schilling v. Schwitzer-Cummins Co., 79 U. S. App. D. C. 20, 142 F. 2d 82, 84. And see Woods v. Oak Park Chateau Corp., 7 Cir., 179 F. 2d 611; Shapiro v. Rubens, 7 Cir., 166 F. 2d 659; *cf.* Life Savers Corp. v. Curtiss Candy Co., 7 Cir., 182

F. 2d 4; Skelly Oil Co. v. Holloway, 8 Cir., 171 F. 2d 670, 672-673.

"Where there is, as here, a conflict in the evidence it becomes the duty of the trial court to appraise all facts adduced in proof and it is not clearly erroneous for that court to choose between two permissible and conflicting views as to the weight of the evidence. Bjornson v. Alaska S. S. Co., 9 Cir., 193 F. 2d 433. We may not disturb such a choice by the trier of the facts. On the record made in this case we must and do conclude that the findings of fact are not clearly erroneous."

The rule is even more rigid when applied to the findings of the District Court to a case brought by the Government under Section 231, 31 U. S. C. for the statute "is not only penal but diastically penal" and for that "reason it has been strictly construed."

United States ex rel. Brensilber v. Bausch & Lomb Optical Co. (C. A. 2), 131 F. 2d 545, 547 (1942), aff'd (Nov. 8, 1943), 320 U. S. 711, 64 S. Ct. 187, Reh. den. (Dec. 6, 1943), 320 U. S. 814, 64 S. Ct. 256.

II.

There Is No Merit in the Government's Appeal.

The *Brensilber* case, *supra,* contains the latest expression of the Supreme Court on the nature and character of an action brought under Section 321, 31 U. S. C.

Fraud is the basis of an action brought by the Government to recover the penalties and damages provided in Section 231, 31 U. S. C. Where the District Court has found, as it did here on competent evidence, that there was no fraud committed by the contractor either in the

bidding or in the performance of the contract, the appeal should be dismissed for failure of the record to present an issue of law which an Appellate Court may consider and decide.

Central Steel Tube Co. v. Herzog (C. A. 8), 203 F. 2d 544, 546 (1953);

Empire District Electric Co. v. Rupert (C. A. 8), 199 F. 2d 941 (1952);

Maryland Casualty Co. v. Independent Metal Products Co. (C. A. 8), 203 F. 2d 838, 841 (1953);

Clarke Hybrid Corn Co. v. Stratton Grain Co. (C. A. 8), 214 F. 2d 7, 9 (1954).

III.

The Government Is Precluded From Maintaining This Action by the Decision of Army Ordnance Finding as a Fact That the Regulators Delivered Were the Regulators Contracted for and That They Complied in All Respects With the Specifications of the Contract.

Contract No. DA-20-018-ORD-3951 recites that "this contract is authorized under the authority of the Armed Services Procurement Act of 1947, Public Law, No. 413, 80th Congress, 41 U. S. C. A. 151-161." [S. R. 286.] The contract was advertised, pursuant to Section 151(c), 41 U. S. C., by circular letter sent to 56 approved dealers, of whom appellee, National Wholesalers, was one. Twenty-one bids were received. The bid of appellee, National Wholesalers, was the lowest. The bid of National Wholesalers was accepted April 1, 1950, and this contract ensued. The contract [S. R. 285-295] was on WD Form 106 with Schedule "A" and conditions at-

tached. [Find. XI, R. 52.] The Army was given authority by Section 153(a), 41 U. S. C. to make the form of the contract of any type which in the opinion of the Secretary of War would "promote the best interests of the Government." One of the conditions of the contract to which the contractor had to submit was paragraph 14 [S. R. 287] which is as follows:

> "14. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor. Within 30 days from said mailing the Contractor may appeal to the Secretary of War, whose decision or that of his designated representative, representatives, or board shall be final and conclusive upon the parties hereto. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract."

Section 156, 41 U. S. C., gives the Secretary of War or his delegated representatives complete authority to make final decisions in all matters pertaining to procurement and the performance of contracts made as this one was pursuant to *Armed Services Procurement Act* of 1947. [S. R. 286.] The Secretary of War, as he was authorized to do by Section 153(a), 41 U. S. C., chose to insert Paragraph 14 in the contract as the method to be used for making the final decisions he is authorized to make by Section 156(a).

The determinations of Army Ordinance, whose authority to make decisions is conceded by the Government, that

the entire 6600 regulators delivered to the Government were the regulators contracted to be delivered by appellees and that all of the regulators complied strictly with the specifications of the contract, were determinations of fact which erase the Government's case. "The correctness of the Secretary's determination is not open to attack on judicial review."

De Cambra v. Rogers, 189 U. S. 119, 23 S. Ct. 519, 520-521 (1903);

Wann v. Ickes, Secretary of the Interior (C. A. D. C.), 92 F. 2d 215, 217 (1937);

Standard Oil Co. of California, v. United States (C. A. 9), 107 F. 2d 402, 422 (1940);

Estes v. Timmons, 199 U. S. 391, 26 S. Ct. 85, 86 (1905);

Whitcomb v. White, 214 U. S. 15, 29 S. Ct. 599, 600 (1909);

United States v. Binghampton Construction Co., 347 U. S. 171, 177, 74 S. Ct. 438, 441 (1954, citing Public Contracts Law, 41 U. S. C., Sec. 35 *et seq.*);

Friend v. Lee, Adm'r., Civil Aeronautics Administration (C. A. D. C.), 221 F. 2d 96, 100 (1955).

The standard dispute clause, quoted above [Par. 14, S. R. 287], is prescribed by The Congress for Government contracts. (41 U. S. C., *Appendix,* Secs. 54.1 and 54.13, *Art.* 15.)

The settlement of a dispute by the Secretary or his authorized representative under such a dispute clause cannot be attacked by the Government without pleading and proving fraud on the part of the officer making the

decision. The complaint alleged no fraud on the part of the contracting officer. His authority is conceded by the Government.

Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106 (1878);

United States v. Moorman, 338 U. S. 457, 70 S. Ct. 288 (1950);

United States v. Wunderlich, 342 U. S. 98, 100, 72 S. Ct. 154, 155 (1951);

Sunroc Refrigeration Co. v. United States (D. C. E. D. Penn.), 104 Fed. Supp. 131 (1952).

The United States cannot attack administratively or judicially the determination of a question of fact by the head of an executive department or his delegated representative.

United States v. Bucher (C. A. 8), 15 F. 2d 783, 786 (1926);

National Labor Relations Board v. Air Associates (C. A. 2), 121 F. 2d 586, 590 (1941);

United Foundations Corp. v. United States (Ct. Cl.), 127 Fed. Supp. 798 (1955);

Johnson Contracting Corp. v. United States (Ct. Cl.), 119 Fed. Supp. 788, 792 (1954);

Brown & Root v. United States (Ct. Cl.), 116 Fed. Supp. 732, 739 (1953).

The Government's position is murky. It concedes the authority of the contracting officer to make and to modify the contract. The clouded reasoning in which Counsel indulge, attempting to show that the qualification of the regulator as an "or equal" had no application to the 4086 regulators already delivered but applied to the 2514 to

be delivered, is beyond comprehension, as is the claim of Counsel that the procedure for qualifying the regulator as an "or equal" [S. R. 292] was of importance because not followed in the beginning. The contracting officer understood that the *Special Condition* for qualifying the regulator as an "or equal" was a matter of procedure only and waived it. [R. 117; Appellant's Br. pp. 20-21.] It was stipulated by the Government that the regulators already delivered were qualified by the contracting officer's decision [R. 115-118] as "or equals," and that the contracting officer had the right to so change or modify the contract. [R. 77-96 and 114-115.] And again at page 118 of the Record, Counsel for the Government, Mr. Weisz, made the following concession:

> "Mr. Weisz: If the court would care to have the Contracting Officer called, he is present in the courtroom.
>
> The Court: That is the Contracting Officer's letter of what date, now? Let's have it described in the record.
>
> Mr. Neblett: October 16, 1950.
>
> The Court: October 16, 1950. Now, does the Government propose to impeach that determination?
>
> Mr. Weisz: Your Honor, the Government does not propose to impeach the determination, as such. The Government is in no position to do anything about it. The Contracting Officer had a right to qualify that regulator as 'or equal.'"

Findings III, IV, V and VI [R. 48-50], which are not attacked by the Government are in strict accord with

the concessions and stipulations made by the Government in the District Court.

A large part of the Government's Brief is devoted to Assignment of Error, Number 7 (Appellant's Br. p. 10), where it is asserted that the Court erred in excluding the Government's offer of proof that the regulators delivered were inferior to the one contracted to be delivered. Appellees feel that this Court will refuse to consider Assignment of Error Number 7 to which appellant devotes about half its argument. The appellant has failed to comply with Rule 18(d) of this Court, the applicable part of which is as follows:

> "18(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. *When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found.*"

It is obvious why appellant failed to comply with Rule 18(d); it could not do so without running into the concessions, stipulations, and findings cited above, which show that the Government has never had even the semblance of case under Section 231, 31 U. S. C.

IV.

Neither the Suit in the District Court nor This Appeal Was or Is Being Prosecuted in Good Faith.

We challenge the good faith of the Department of Justice in bringing the suit and in prosecuting this appeal. When the suit was filed, July 3, 1953, the Department of Justice had for seventy-five years successfully defended in the Courts the decisions of a department head or his authorized representative in favor of the Government. (See *Kihlberg v. United States,* 97 U. S. 398, 24 L. Ed. 706 (1878), and *United States v. Wunderlich,* 342 U. S. 98, 72 S. Ct. 154 (1951).) Although the Department of Justice had full knowledge of the dispute and the settlement of it by Ordinance, [Deft. Ex. C; R. 259] the Government filed its complaint three years after the settlement was made. The complaint [R. 3-9] is bare of any reference to the settlement. Fairness to the appellees should have required the Department of Justice to refrain from bringing the suit; but if brought, fairness to the appellees should have compelled the Government to allege the settlement of the dispute by Ordinance and then to attack the settlement in the only way possible by alleging fraud on the part of the Army officers who made it.

United States v. Wunderlich, supra.

Without alleging fraud on the part of the Army Ordnance officers who made the tests of the regulator and rendered the decision that the regulator complied with the contract, the charge in the complaint was an empty one partaking of the extortion features condemned by the Court of Appeals of the Second Circuit in *United States ex rel. Brensilber v. Bausch & Lomb Optical Co., supra,* affirmed by the Supreme Court, 320 U. S. 711,

64 S. Ct. 187 (1943). In that case the Court said, 131 F. 2d 545, 547, that:

> "The motion for summary judgment dismissing both (complaints) was right because it appears beyond question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded *nolo contendere,* and that this in turn rested upon the contracts. No testimony was necessary or indeed relevant to the issues so arising. *To subject the defendants to a long harassment by examination and trial upon a certainly empty charge could serve no purpose except possibly to force them to buy their peace, an extortion against which 31 U. S. C. A. Sec. 232 would not protect them.* The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud." (Emphasis ours.)

For the same reasons as those challenging the Department of Justice's good faith in bringing this suit, the appeal appears to be prosecuted in bad faith.

We respectfully contend that the judgment should be affirmed.

Respectfully submitted,

Wm. H. Neblett,

Attorney for Appellees.